Supreme Court, U.S.
FILED
05-673 NOV 21 2005
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

STEVEN A. KOZUB AND S.S.A.M., INC.,
a California corporation,
Petitioners,

v.

CITY OF POMONA, a California corporation,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal Second Appellate District, Division Two

PETITION FOR WRIT OF CERTIORARI

ROGER JON DIAMOND, ESQ.
Counsel of Record
2115 MAIN STREET
SANTA MONICA, CA 90405
(310) 399-3259
(310) 392-9029 FAX

Counsel for Petitioners

NOVEMBER 21, 2005

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTIONS PRESENTED

1. Does a city violate the First and Fourteenth Amendments to the United States Constitution when it adopts and enforces an adult zoning ordinance that requires an adult cabaret to relocate to the industrial zone and prohibits such businesses in the commercial zones, especially where the industrial zone is occupied by on-going businesses by owners of properties within the industrial zone?

2. Is the decision of the California Court of Appeal, which reversed a state trial court's findings and judgment, that city's adult zoning ordinance was unconstitutional as applied, consistent with this Court's decisions in Young v. American Mini Theater, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) and Renton v. Playtime Theaters, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29, rehg.den. 475 U.S. 1132, 106 S.CT. 1663, 90 l.Ed.2d 205 (1986), that a city must provide an adult business operator (bookstore, theater, cabaret) a reasonable opportunity to open?

PARTIES TO THE PROCEEDINGS

Petitioner: Stephen A. Kozub is the Petitioner and the owner of S.S.A.M., Inc., a California Corporation

Respondent: The City of Pomona is a municipal corporation in the State of California.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

TABLE OF APPENDICES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL ANS STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 18

CONCLUSION 24

TABLE OF AUTHORITIES

Faretta v. California, 422 U.S. 806,95 S. Ct. 2525,
45 L. Ed. 2d 562 (1975) 2

Renton v. Playtime Theaters,
475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29,
rehg.den., 475 U.S. 1132, 106 S.Ct. 1663,
90 L. Ed. 2d 205 (1986) . . . . . *passim*

Topanga Press, Inc. v. City of Los Angeles,
989 F.2d 1524 (9th Cir 1993) 14, 17, 18

Walnut Properties, Inc. v. City of Whittier,
861 F.2d 1102 (9th Cir . 1988) 11

Young v. American Mini Theater,
427 U.S. 50, 96 S. Ct. 2440,
49 L. Ed. 2d 310 (1976) 15, 17, 19, 20

STATE CASES

City of National City v. Wiener,
3 Cal. 4th 832 (1992) 13

Cook County v. Renaissance Arcade and Bookstore,
122 Ill. 2d 123, 522 N.E.2d 73 (Ill. 1988) 18

Reichardt v. Hoffman,
52 Cal. App. 4th 754 (1997) 10

Town of Islip v. Caviglia,
73 N.Y.2d 544, 540 N.E.2d 215 (N.Y. 1989) 18

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I 2

U.S. Const. amend. XIV, Sec. 1 2

28 U.S.C. § 1257(a) 2

CITY CODE AND ORDINANCES

Pomona City Code Section .410 3

Pomona City Code Section .420 4

Pomona Ordinance No. 1466 Section .5809(c) 3

Pomona Ordinance No. 1466 Section .5809(d) 3

TABLE OF APPENDICES

APPENDIX A:
Court of Appeal Unpublished Decision 1a

APPENDIX B:
Superior Court Judgment Granting Injunction 11a

APPENDIX C
Superior Court Report of Referee &
Proposed Order 13a

APPENDIX D
Court of Appeal Petition for Rehearing Denied . . . 23a

APPENDIX E
Supreme Court Unpublished Order 24a

PETITION FOR WRIT OF CERTIORARI

Petitioners Stephen A. Kozub and S.S.A.M., Inc, a California corporation ("Kozub") respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the California Court of Appeal, Second Appellate District, Division Two, entered on June 2, 2005. The California Supreme Court denied discretionary review on August 24, 2005.

OPINIONS BELOW

The unpublished opinion (June 2, 2005) of the California Court of Appeal, Second Appellate District, Division Two, is not reported. It is Appendix A at 1a-10a. The Superior Court of the State of California for the County of Los Angeles issued a permanent injunction in favor of Petitioners against Respondent City of Pomona on February 4, 2004. The injunction is not reported. It is Appendix B at 11a-12a.

The injunction issued by the trial court (Appendix B) was based upon a report submitted on January 20, 2004 by a retired state appellate justice who conducted an evidentiary hearing and inspected each site. The report, unpublished, is Appendix C at 13a-22a.

On June 10, 2005 the California Court of Appeal, Second Appellate District, Division Two, denied without opinion the Petition for Rehearing (Appendix D at 23a).

The California Supreme Court on August 24, 2005 denied discretionary review in an unpublished order, Appendix E at 24a.

STATEMENT OF JURISDICTION

The California Court of Appeal, Second Appellate District, Division Two, issued its Opinion on June 2, 2005. On June 15, 2005 Petitioners filed a timely Petition for Rehearing, which the Court of Appeal, Second Appellate District, Division Two, summarily denied without explanation on June 20, 2005.

On August 24, 2005 the California Supreme Court denied discretionary review. This Petition for a Writ of Certiorari is filed within 90 days of the denial of the Petition for Review. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(a). See Rule 13(1) of the Supreme Court Rules. See also Faretta v. California, 422 U.S. 806, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975), where this Court reversed an unpublished decision of the California Court of Appeal, Second Appellate District after the California Supreme Court denied discretionary review.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I

> Congress shall make no law . . . abridging the freedom of speech . . . .

U.S. Const. amend XIV, sec.1

> . . . No state . . . shall deprive any person of life, liberty, or property, without due process of law. . . .

Pomona Ordinance No. 1466, Section .5809-5(c)

"Adult-Oriented Business shall be established or permitted in the City's M-1 (Light Industrial) and M-2 (General Industrial) zones."

Pomona Ordinance 1466, Section .5809-5(d)

"1. No Adult-Oriented Business shall be established or located within certain distances of certain specified land uses or zones as set forth below:

a. within 750 feet of any other Adult-Oriented Business in the city adjacent city or shopping center property line; or

b. within 1,000 feet from any existing residentially zoned property or sensitive use in the city or cities adjacent to the city. . . ."

Pomona City Code Section .410

"The light industrial district ("M-1") is intended to provide for the development of industrial uses which include fabrication, manufacturing, assembly or processing of materials that are in a processed form and which do not in their maintenance, assembly, manufacture or plant operation create smoke, gas, odor, dust, sound, vibration, soot or lighting to any degree which might be termed obnoxious or offensive to persons residing in or conducting business in either this or any other zoning district of the city. . . ."

Pomona City Code Section.420

"The 'M-2' general industrial district is intended to provide for the establishment of certain industrial uses considered by the council to be essential to the development of a balanced economic base for the city...."

STATEMENT OF THE CASE

Petitioners have operated their "Baby Dolls Theater," an adult cabaret, in the City of Pomona, since 1998 (Slip Opinion, p. 2). In the year 2002, the City of Pomona revised its Municipal Code and restricted the location of adult businesses. Adult businesses must be at least 1,000 feet from sensitive uses such as residences, churches, schools, parks, and daycare facilities. Also adult businesses may not be operated within 750 feet of other adult businesses. Furthermore, adult businesses are restricted to the "light or general industrial zones." (Slip Opinion, p. 3; Appendix A at 3a).

Petitioners sued the City to enjoin it from enforcing its adult zoning ordinance on the ground that Petitioners could not relocate to the light or general industrial zones because there are too few, if any, properties available for such a business.

As the Court of Appeal acknowledged at page 3 of its Slip Opinion, the trial court appointed a referee to resolve "whether under the City's present adult zoning ordinance, the City allows for the establishment of a reasonable amount of alternative adult use relocation sites." (Slip Opinion, p. 3; App. A). As the Court of Appeal noted, the referee was to consider evidence "to determine the availability of 31

alternative sites identified by Pomona." (Slip Opinion, p. 3; App.A).

The hearing was conducted by Robert E. Feinerman, a retired Justice of the State Court of Appeal. For convenience Petitioners will be referred to as "Kozub," since Steven A. Kozub, one of the Petitioners, was the name used in the courts below.

Justice Feinerman literally examined each property claimed by the City to be available. Feinerman "conducted a parcel-by-parcel examination of prospective sites identified by Pomona as being suitable for an adult business. . . ." (Slip Opinion, p. 4; App.A).

Justice Feinerman "rejected each site." (Slip Opinion, p. 4; App. A). Given his conclusion that no site was available, Justice Feinerman ". . . concluded that Kozub had carried his burden of establishing that Pomona lacks a reasonable amount of adult use relocation sites." (Slip Opinion, p. 4; App. A). Because Justice Feinerman concluded that none of the sites was available he did not follow up by determining how many adult businesses could operate simultaneously in the City of Pomona given the 750 foot restriction imposed by the ordinance with respect to two adult businesses. On February 4, 2004 the Superior Court adopted the recommendation of Justice Feinerman and issued a permanent injunction prohibiting the City of Pomona from enforcing its current adult zoning ordinance against Kozub (Clerk's Transcript ("CT"), pp. 365-366).

Kozub had alleged in his Third Amended Complaint that he had been operating his Baby Dolls adult cabaret theater at 2005 West Holt Avenue in the City of Pomona since June of 1998 and had alleged that the City of Pomona was threatening